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# **THE RIGHT TO AN 'EFFECTIVE JUDICIAL REMEDY' AND THE CHANGING CONDITIONS OF IMPLEMENTING EU LAW**

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# The Right to an ‘Effective Judicial Remedy’ and the changing conditions of implementing EU Law

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## ***Abstract:***

*One of the key principles of law allowing for the development and consequent enforcement of EU law in the past decades is the right to an effective judicial remedy. This working paper summarises its effects, outlines its main sources, its scope of protection, its limits and some future challenges to its application within the EU’s complex system of implementation of EU law. The special difficulties for a system of remedies arises from the parallel existence of implementation of EU law by Member States bodies mostly undertaken in horizontal cooperation with other Member States and vertically with EU institutions bodies and agencies. This cooperation is often highly proceduralised which makes it challenging to identify responsibilities and thus allocate remedies.*

The Court of Justice of the European Union (CJEU) has held that in the absence of judicial remedies on the Union level, it is for the Member States to establish a sufficiently complete ‘system of legal remedies and procedures which ensure respect for the right to effective judicial protection’ of Union law.<sup>1</sup> One of the key principles in the context of the protection of rights against public actors has been the right to an effective judicial remedy.<sup>2</sup> The latter is not only a General Principle of EU law, requiring that rights arising from EU law, be ‘effectively protected in each case’,<sup>3</sup> it is also explicitly recognised in Article 47 of the Charter of Fundamental Rights of the EU (CFR) as the right to an

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<sup>1</sup> Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, paras 40, 41; Case C97/91 *Oleificio Borelli* [1992] ECR I-6313, para 15.

<sup>2</sup> The Court of Justice has repeatedly found this right to be a fundamental right of individuals resulting from the common constitutional traditions of the Member States and recognised Articles 6 and 13 of the ECHR, applicable as sources of General Principles of EU law under Article 6(3) TEU. See e.g.: Case 222/84 *Johnston* [1986] ECR 1651, paras 18 and 19; Case 222/86 *Heylens and Others* [1987] ECR 4097, para 14; Case C-424/99 *Commission v Austria* [2001] ECR I-9285, para 45; Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, para 39; Case C-467/01 *Eribrand* [2003] ECR I-6471, para 61; Case C-432/05 *Unibet* [2007] ECR I-2271, para 37; Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat* [2008] ECR I-6351, para 335; Case 12/08 *Mono Car Styling* [2009] ECR I-6653, para 47; Joined Cases C-317/08 to C-320/08 *Alasini* [2010] ECR I-2213, para 61.

<sup>3</sup> Case 179/84 *Bozzetti* [1985] ECR 2301, para 17; Case 222/84 *Johnston* [1986] ECR 1651, para 18. Understood in that sense, Article 47 CFR requires a broad interpretation of Article 51(1) CFR. However, the right to an effective judicial remedy is also, next to its recognition under Article 47 CFR recognised as General Principle of EU law (Article 6(3) TEU), the application of which to Member States is limited by the case law and is not subject to Article 51 CFR.

‘effective remedy before a tribunal’. Member States are bound by it when implementing EU law and when acting within its scope.<sup>4</sup> Accordingly, Member States are obliged to ensure that their courts provide ‘direct and immediate protection’ of rights arising from the Union legal order,<sup>5</sup> and national procedural and substantive rules which have an actual or potential effect on the existence, degree and enforceability of remedies to enforce rights arising from EU law comply with EU law requirements.<sup>6</sup> In short, the CJEU requires that where there is a right under Union law, Member States should offer a remedy to ensure its enforcement (*ubi ius ibi remedium*) ‘both in law and in practice.’<sup>7</sup>

Implementation of EU law, however, is less clearly structured according to Member State or EU-levels. In fact, although organisationally separate, actors from different levels often conduct procedures in close cooperation making the protection of rights arising under EU law in this context is an ever more challenging task. The aim of this paper is to explore in this context, whether and how the right to an effective judicial remedy, which has had a profound influence on the development of the EU-specific system of remedies, needs to be adaptation to the changing conditions of implementation of EU law marked by an ever closer cooperation of the executive branches of power on the EU level and the levels of the Member States. In order to do so, this paper adopts a classic legal approach by exploring first the scope of protection offered to individuals by the right to an effective remedy in the different constellations of a final act implementing EU being issued by an institution body or agency of the EU or of the Member States as well as in the context of disputes between individuals. The paper then looks at accepted limitations of the right before deducting from this screening exercise where problems of effective judicial protection can be located in today’s system of implementation of EU law in relation to the reality of highly integrated implementation procedures.

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<sup>4</sup> See Article 51(1) CFR and the interpreting cases, especially C-617/10 *Akerberg* [2013] ECR I-nyr of 26. February 2013, paras. 19-21. With respect to the notion of the principle of the right to an effective judicial remedy as General Principle of EU law protected under Article 6(3) TEU, Case C-260/89, *ERT-AE v DEP* [1991] ECR I-2925, paras 41-43. The right to an effective judicial remedy therefore also protects the principles of direct effect and primacy of EU law (Case 26/62 *Van Gend en Loos* [1963] ECR 1, paras 10, 12, 13; 6/64 *Costa v. ENEL* [1964] ECR 1141; Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal* [1978] ECR 629, para. 17), in as it requires that ‘everyone whose rights and freedoms are guaranteed by the law of the Union’, be given the possibility to obtain a ‘remedy to set aside national measures which are in conflict therewith.’ (W. van Gerven, ‘Of Rights, Remedies and Procedures’, 37 *CMLRev.* (2000) 501–36, at p. 509; Case C-213/89 *Factortame* [1990] ECR I-2433, paras. 18-21).

<sup>5</sup> Case 13/68 *Salgoil* [1968] ECR 453 at page 463.

<sup>6</sup> AG Trstenjak offered an extensive interpretation of this expression in her Opinion in Case C-411/10 *N.S.* [2011] ECR-nyr, paras 149-177, also including infringements of the Geneva Convention and the ECHR.

<sup>7</sup> Application no 30210/96 *Kudla v Poland* [GC] §157, ECHR 2000-XI. Article 13 ECHR is, however, more limited than the right to an effective judicial review under EU law. Article 13 ECHR protects only rights arising from the Convention – therefore only fundamental rights and freedoms. The General Principle of EU law, by contrast, protects all rights arising from EU law in both a vertical and a horizontal level. For further explanation see below in this commentary.

## *The Scope of Protection of the Right to an Effective Remedy*

Identifying the scope of protection of the right to an effective judicial remedy in the system of multiple sources of the Union has not become more easy with the explicit recognition of the General Principle of EU law in Article 47 of the Charter of Fundamental Rights of the Union (CFR). First, any right listed therein must be interpreted and exercised ‘under the conditions and within the limits’ defined by relevant Treaty provisions which make provision for it (Article 52(2) CFR). In this sense, the right to an ‘effective remedy before a tribunal’ is interpreted in the context of Article 19(1) TEU which establishes that national judges are judges of Union law in that Member States ‘shall provide the remedies sufficient to ensure effective legal protection in the fields covered by Union law’ - a specification of the general obligation under the principle of sincere cooperation (Article 4(3) TEU) obliging Member States to ‘take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising’ from EU law. The Court of Justice (CJ) has repeatedly held that the principle of sincere cooperation includes the obligation of judicial enforcement of EU law before national Courts.<sup>8</sup> Article 47 CFR in this sense states the previously obvious fact individuals have the right to enforce the obligation of the Member States under Articles 4(3) and 19 TEU to grant an effective judicial review. Secondly, under Article 52(3) CFR, the right to an effective judicial remedy also needs to be interpreted to at least the same level as relevant rights under the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) as interpreted by the Court of Human Rights in Strasbourg (ECtHR). In fact, Union Courts, ever since recognising the right to an effective judicial remedy as General Principle of EU law, have referred to its origins *inter alia* from Articles 6 and 13 of the ECHR.<sup>9</sup> In the case law of the ECtHR, Article 6 is

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<sup>8</sup> See to the relation between the principle of sincere cooperation and the right to an effective judicial remedy e.g.: Case 33/76 *Reve* [1976] ECR 1989, para 5; Case 45/76 *Comet* [1976] ECR 2043, para 12; Case 106/77 *Simmmenthal* [1978] ECR 629, paras 21 and 22; Case C-213/89 *Factortame and Others* [1990] ECR I-2433, para 19; Case C-312/93 *Peterbroeck* [1995] ECR I-4599, para 12; Case C-432/05 *Unibet* [2007] ECR I-2271, para 38: ‘Under the principle of cooperation laid down in Article 10 EC [now Article 4(3) TEU], it is for the Member States to ensure judicial protection of an individual’s rights under Community law’. The Court regularly recites the formulation according to which ‘it is settled case-law that in the absence of Community rules governing the matter it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided, however, that such rules are not less favourable than those governing similar domestic actions (the principle of equivalence) and do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (the principle of effectiveness).’ See: Case C-63/01 *Evans* [2003] ECR I-14447, para 45 with reference also to Case C-120/97 *Upjohn* [1999] ECR I-223, para 32.

<sup>9</sup> M. Poelmans, *La sanction dans l’ordre juridique communautaire* Bruylant (Bruxelles, 2004), 621. See e.g.: Case 222/84 *Johnston* [1986] ECR 1651, paras 18 and 19; Case 222/86 *Heylens and Others* [1987] ECR 4097, para 14; Case C-424/99 *Commission v Austria* [2001] ECR I-9285, para 45; Case C-50/00 *P Unión de Pequeños Agricultores v Council* [2002] ECR I-

regarded as *lex specialis* to Article 13 ECHR in that the requirements of Article 13 are ‘absorbed by more stringent requirements of Article 6’ ECHR.<sup>10</sup> The effect of Article 13 ECHR is ‘to require the provision of a domestic remedy to deal with ... an “arguable complaint” under the Convention and to grant appropriate relief.’<sup>11</sup> The formulation of Article 13 ECHR is more limited than that of Article 47 CFR in that grants the right to an effective remedy only before national courts. In any case, the right to an effective judicial remedy must at least offer the level of protection which Articles 6 and 13 ECHR would have guaranteed. Finally, Article 52(4) CFR also requires interpretation of Article 47 in light of the common constitutional traditions of the Member States.<sup>12</sup>

In this context, the CJEU has ruled that effective judicial protection must be offered by courts and tribunals recognised as such by EU law both on the EU-level and by national courts.<sup>13</sup> The notion of independence and impartiality requires that a tribunal be impartial and be competent to rule on both facts and law.<sup>14</sup> These conditions are well illustrated by the case *Wilson*, in which the Court found a breach of the right to an effective judicial review. In order to implement an EU directive allowing lawyers to practise under certain conditions in another Member State, Luxembourg had designated bodies linked to the local bar association to take the initial decisions. The Court found that such bodies were not impartial under the conditions of the right to an effective judicial remedy. A body is impartial, only when it is ‘protected against external intervention or pressure liable to jeopardise the independent judgment of its members as regards proceedings before

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6677, para 39; Case C-467/01 *Eribrand* [2003] ECR I-6471, para 61; Case 12/08 *Mono Car Styling* [2009] ECR I-6653, para 47; Joined Cases C-317/08 to C-320/08 *Alassini* [2010] ECR I-2213, para 61.

<sup>10</sup> See e.g. Application 31556/03 *Efendiyeva v Azerbaijan* §59, ECHR 2007; 31720/02 *Titarenko v Ukraine* §80, ECHR 2012.

<sup>11</sup> Application 63235/00 *Vilho Eskelinen and Others v Finland* [GC] §80, ECHR 2007.

<sup>12</sup> The right to an effective remedy is recognised under national law. To name just one example, Article 19(4) of the German Basic Law (Federal Constitution) requires to grant judicial the possibility of judicial review against claimed violations of rights committed by public institutions bodies and other forms of public action.

<sup>13</sup> The relevant definition of a national court or tribunal under the Union right to an effective judicial remedy is the same as has been laid down by the Court in the definition of bodies entitled to make a preliminary reference under Article 267 TFEU. See: C-506/04 *Wilson* [2006] ECR I-8613, para 48 with reference (by analogy) to Joined Cases C-238/99 P, C-244-245/99P, C-250/99P, C-252/99P, C-254/99P *Limburgse Vinyl Maatschappij and Others* [2002] ECR I-8375, paras 180-205, 223, 234. A tribunal, by analogy to the case law under Article 267 TFEU, is thus to be assessed in the sense of Article 47 CFR by taking into account factors such as ‘whether the body is established by law, whether it is permanent, whether its jurisdiction is compulsory, whether its procedure is *inter partes*, whether it applies rules of law’ (Case C-54/96 *Dorsch Consult* [1997] ECR I-4961, para 23; Joined Cases C-110/98 to C-147/98 *Gabalfria and Others* [2000] ECR I-1577, para 33; Case C-17/00 *De Coster* [2001] ECR I-9445 para. 10; C-506/04 *Wilson* [2006] ECR I-8613, para 48 – each with further references) and its independence and impartiality (Case 14/86 *Pretore di Salò* [1987] ECR 2545, para 7; Case 338/85 *Pardini* [1988] ECR 2041, para 9).

<sup>14</sup> Case C-506/04 *Wilson* [2006] ECR I-8613, paras 60-62.

them.’<sup>15</sup> Additionally, there have to be guarantees ‘sufficient to protect the person of those who have the task of adjudicating in a dispute, such as guarantees against removal from office’.<sup>16</sup> Impartiality further requires that judges act with a degree of objectivity which requires ‘the absence of any interest in the outcome of the proceedings apart from the strict application of the rule of law do not have any specific interest in the outcome of the procedure’.<sup>17</sup>

Applying these conditions of review to acts adopted to implement EU law has led to groups of cases I would summarise under three different sub-categories: Disputes about acts adopted by EU institutions bodies and agencies; disputes about implementing acts by Member States; and finally disputes arising between individuals in which EU law or rights resulting from EU law might be decisive for the outcome of the dispute.

#### ***A EU-level implementation***

Where legal protection is required on the EU level, the CJ has rather apodictically stated that the Treaties have ‘created a complete system of legal remedies’.<sup>18</sup> As restated in Article 19 TEU these include both direct challenges before EU courts and indirect challenges before national courts. However, according to strict interpretation of standing rights by the CJEU,

‘the Courts of the European Union may not, without exceeding their jurisdiction, interpret the conditions under which an individual may institute proceedings against a regulation in a way which has the effect of setting aside those conditions, expressly laid down in the Treaty, even in the light of the principle of effective judicial protection.’<sup>19</sup>

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<sup>15</sup> Case C-506/04 *Wilson* [2006] ECR I-8613, para 51 with reference to Case C-103/97 *Köllensperger and Atzwanger* [1999] ECR I-551, para 21; C-407/98 *Abrahamsson and Anderson* [2000] ECR I-5539, para 36; See also the ECtHR interpreting the requirements of Article 6 ECHR in Application no. 7819/77; 7878/77 *Campbell and Fell v. United Kingdom*, § 78 ECHR 1984, Series A No 80.

<sup>16</sup> Case C-506/04 *Wilson* [2006] ECR I-8613, para 51 with reference to Joined Cases C-9/97 and C-118/97 *Jokela and Pitkäranta* [1998] ECR I-6267, para 20.

<sup>17</sup> Case C-506/04 *Wilson* [2006] ECR I-8613, para 52.

<sup>18</sup> Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677, para 40; Case C-263/02 P *Jégo-Quéré* [2004] ECR I-3425, para 30; Case C-167/02 P *Rothley* [2004] ECR I-3149, para 46; C-461/03 *Gaston Schul* [2005] ECR I-10513, para 22.

<sup>19</sup> Order of the General Court in Case T-18/10 *Inuit* [2011] ECR II-nyr, para 51. The tone of these statements appears to be remarkably different from the broadening notion to judicial review and standing – where necessary in expansion of the existing wording of the Treaty – in Case 294/83 *Les Verts* [1986] ECR 1339, para 23 on the basis of the rule of law.

From this follows that in view of the CJEU the right to an effective remedy does not require an extension of the existing forms of action listed in the Treaties – to the contrary of what the plaintiffs in *UPA*, *Jégo Quéré* and *Inuit* had pleaded.<sup>20</sup> This stance taken by the CJEU had left a certain degree of danger of remaining gaps in protection.

The Courts' formulaic repetition of the notion of a 'complete system of judicial protection' notwithstanding, the Treaty of Lisbon introduced an amendment to the fourth paragraph of Article 263 TFEU under which individual persons can bring actions for annulment of 'regulatory acts' which are of direct effect and for which no further implementing acts are required. AG Kokott in her Opinion in *Inuit*,<sup>21</sup> in view of resisting dangers of gaps in legal protection, suggested to fill these gaps essentially by introducing a declaratory action in the following form: The first would concern cases where individuals seek review of an EU act of legislative nature of direct effect which did not require further implementing acts by the Member States. It would be in violation of the right to an effective judicial review, if a natural person would first have to violate such law in order to be able to invoke indirectly its illegality in defence against a penalty for violation of that act.<sup>22</sup> In order to remedy that situation, where it is for Member States bodies to enforce the law, Kokott therefore suggests creating - under EU law - an obligation by national authorities to provide for a reasoned answer to an individual's request for clarification of rights and obligations arising from EU law. Such answer would then need to be understood by national courts as a decision against which standing under national law would need to be granted. An individual might, in case of a preliminary reference before the CJEU then also incidentally claim under Article 277 TFEU the illegality of the legislative act. Where it is, on the other hand, for Union bodies to enforce EU law, AG Kokott suggests that the right to good administration, a General Principle of EU law which is also protected under Article 41 CFR, should oblige the Union bodies to provide for an answer as to the applicability of a legal obligation directly arising under an EU legislative act. In order to avoid a gap in the legal protection of individuals, in potential violation of the right to an effective judicial remedy under Article 47 CFR, such answer, she claims, would need to be interpreted as decision under Article 288 TFEU against which standing under the fourth paragraph of Article 263 TFEU

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<sup>20</sup> Case C-50/00 P *Unión de Pequeños Agricultores* [2002] ECR I-6677, paras 37-40; Case C-263/02 P *Jégo-Quéré* [2004] ECR I-3425, paras 29, 30, 36; Order of the General Court in Case T-18/10 *Inuit* [2011] ECR II-nyr, paras 50-52.

<sup>21</sup> See paras 115-122 of the Opinion of AG Kokott of 17 January 2013 in Case C-583/11 P *Inuit* [2013] ECR I-nyr.

<sup>22</sup> Case C-263/02 P *Jégo-Quéré* [2004] ECR I-3425, paras 29, 30, 36.

should be granted by the CJEU. Whether the Court will follow in future cases these calls for addressing potential gaps in the right to an effective judicial remedy voiced by one of its AGs remains to be seen.

This discussion is applicable to claims brought by individuals as well as those brought by associations. The case law on competition law including state aid control has been especially relevant in illustrating these concepts. Associations representing claimants' interests are

‘as a rule, entitled to bring an action for annulment against a final decision of the Commission in matters of State aid only if the undertakings which it represents or some of those undertakings themselves have *locus standi* or if it can prove an interest of its own.’<sup>23</sup>

This the Court in *Territorio Histórico de Álava* explained, serves reasons of economies of scale since

‘the adoption of a broad interpretation of the right of associations to intervene is intended to facilitate assessment of the context of such cases whilst avoiding multiple individual interventions which would compromise the effectiveness and proper course of the procedure’.<sup>24</sup>

In *ARE* on the other hand, an association of small businesses and former land owners, despite having had actively participated in a formal investigation, could not show to be individually concerned due to the competitive situation they were in. The Court found that a very large amount of competitors, in fact, ‘all farmers in the EU’ could be regarded as competitors of the beneficiaries of the land acquisition scheme’ applied under German law.<sup>25</sup> Similarly, in *Italy and Sardegna v Commission*, the Court held, that a company could not contest ‘a Commission decision prohibiting a sectoral aid scheme if it is concerned

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<sup>23</sup> Joined Cases C-182/03 and C-217/03 *Belgium and Forum 187 ASBL v Commission* [2006] ECR I-5479, para 56: “An association such as Forum 187 which is responsible for protecting the collective interests of coordination centres established in Belgium is, as a rule, entitled to bring an action for annulment against a final decision of the Commission in matters of State aid only if the undertakings which it represents or some of those undertakings themselves have *locus standi* (Case C-6/92 *Federmineraria* [1993] ECR I-6357, paragraphs 15 and 16) or if it can prove an interest of its own (Case C-313/90 *CIRFS* [1993] ECR I-1125, paragraphs 29 and 30).”

<sup>24</sup> Joined Cases T-227/01 to T-229/01, T-265/01, T-266/01 and T-270/01 *Territorio histórico de Álava and Others v. Commission* [2009] nyr, para. 84 with reference, *inter alia*, to the Order of the General Court in Case T-201/04 R *Microsoft v Commission* [2004] ECR II-2977, para. 38.

<sup>25</sup> C-78/03 P *Commission v. ARE* [2005] ECR I-10737, para. 72.



by that decision solely by virtue of belonging to the sector in question and being a potential beneficiary of the scheme.<sup>26</sup>

Also the pre-conditions for litigation to enforce rights and obligations under EU law is covered, e.g. by rights of access to documents to obtain proof or other relevant information. The facts of the case *Verein für Konsumenteninformation (VKI)* serve as an example,<sup>27</sup> although its positive approach towards granting transparency in view of the Treaty's demands have been sadly curtailed to a certain degree by more recent judgements by the Court in *Bavarian Lager* and *Schecke*.<sup>28</sup> Also the proposals for reform of the basic legislation in this matter – regulation 1049/2001 do not appear to favour transparency and strive to achieve the international standard of the Aarhus convention but instead are designed to limit access to documents in the interest of administrative simplification.<sup>29</sup>

## ***B Review against implementing acts of Member States***

Where it comes to Member State action, rights under European law must, under the case law of the CJEU be accompanied by a corresponding remedy. The 'form and extent' of such remedy as well as the procedural rules to make it operational are, however, in principle within national competence,<sup>30</sup> except for matters where the Treaties have explicitly granted jurisdiction to the CJEU.

Under the case law of the CJEU, the obligation of sincere cooperation (Article 4(3) TEU) obliges Member States to offer remedies subject to the principles of equivalence and effectiveness. Under the principle of equivalence, in absence of applicable EU law,

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<sup>26</sup> Case C-15/98 and C-105/99 *Italy and Sardegna v Commission* [2000] ECR I-8855, para. 33 (emphasis added); Joined Cases T-254/00, T-270/00 and T-277/00 *Hotel Cipriani and Italgas v Commission* [2008] ECR II-3269, at paras. 77 and 78. See, however, Case T-9/98 *Mitteldutsche Erdoel-Raffinerie GmbH v Commission* [2001] ECR II-3367, paras 78-85.

<sup>27</sup> Case T-2/03 *Verein für Konsumenteninformation (VKI) v Commission* [2005] ECR II-1121, especially paras 66-74.

<sup>28</sup> C 28/08 P *Commission v Bavarian Lager* [2010] ECR I-6055; Joined Cases C-92 and 93/09 *Schecke* [2010] ECR I-11063.

<sup>29</sup> See Regulation (EC) 1049/2001 regarding public access to European Parliament, Council and Commission documents, OJ 2001 L 145/43 and Regulation (EC) 1367/2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ 2006 L 264/13. This measure brings to force within the Community obligations from the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the Aarhus Convention).

<sup>30</sup> This is sometimes referred to as the principle of national procedural autonomy. It would appear that under the principle of sincere cooperation Member States are under the obligation to provide for procedural provisions to enforce EU law and in doing so have enjoy a margin of discretion – the limits of which also circumscribe the degree of the national procedural autonomy. For further debate and analysis see e.g. D-U. Galetta, *Procedural Autonomy of EU Member States: Paradise Lost?*, Springer (Heidelberg 2010) with further references.

Member States must grant at least equivalent protection for violation of EU law to that available against violation of national law.<sup>31</sup> A rule must 'be applied without distinction, whether the infringement alleged is of Community law or national law'<sup>32</sup> and Member States are prohibited 'under the principle of equivalence to offer conditions less favourable than those governing similar domestic actions.'<sup>33</sup> This applies to procedure including situations and possibilities of class action as well as substantive law. The similarity of a situation is subject to detailed case-by-case analysis, the Court looking at the purpose and effect of a national measure in question and exists 'where the purpose and cause of action are similar',<sup>34</sup> or where the case concerns 'the same kind of charges or dues.'<sup>35</sup>

Although initially, the case law of the Court of Justice claimed that the right to an effective judicial review 'was not intended to create new remedies',<sup>36</sup> the concept has rapidly evolved under the application of the principle of effectiveness. Under the *Factortame*-formula, the right to an effective remedy offers protection against 'any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness' of Union law.<sup>37</sup> That means that Member States should also 'not render virtually impossible or excessively difficult the exercise of rights conferred by Community law'.<sup>38</sup> Thus, national Courts are required to offer active protection of rights arising from Union law and are obliged to 'guarantee real and effective judicial protection'<sup>39</sup> even in cases such as *Factortame* where there was no equivalent form of protection of rights under national law. Anything which 'might prevent, even temporarily, Community rules from having full force and effect' is therefore incompatible with Union law.<sup>40</sup>

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<sup>31</sup> C 205-15/82 *Deutsche Milchkontor* [1983] ECR 2633, para 17; C-453/99 *Courage* [2001] ECR I-6297 para 29

<sup>32</sup> Case C-231/96 *Edis* [1998] ECR I-4951, para 36; Joined Cases 66/79, 127/79 and 128/79 *Salumi* [1980] ECR 1237, para 21.

<sup>33</sup> Case C-261/95 *Palmisani* [1997] ECR I-4025, para 27; C-453/99 *Courage* [2001] ECR I-6297 para 29.

<sup>34</sup> Case C-326/96 *Levez* [1998] ECR I-7835, para 41.

<sup>35</sup> Case C-231/96 *Edis* [1998] ECR I-4951, para 36; Joined Cases 66/79, 127/79 and 128/79 *Salumi* [1980] ECR 1237, para 21.

<sup>36</sup> Case 158/80 *Reve II* [1981] ECR 1805, summary para 6.

<sup>37</sup> Case C-213/89 *Factortame* [1990] ECR I-2433, paras. 19, 20

<sup>38</sup> See e.g. Case C-128/93 *Fischer* [1994] ECR I-4583, para. 37; Case C-261/95 *Palmisani* [1997] ECR I-4025, para 27; C-453/99 *Courage* [2001] ECR I-6297 para 29; Case C-78/98 *Preston and Others* [2000] ECR I-3201, para. 39; Case C-187/00 *Kutz-Bauer* [2003] ECR I-2741, para. 57; Case C-30/02 *Recheio-Cash & Carry* [2004] ECR I-6051, paras. 17, 18; Case C-212/04 *Adeneler and Others* [2006] ECR I-6057, para. 95; Joined Cases C-231/06 to C-233/06 *Jonkman and Others* [2007] ECR I-5149, para. 28.

<sup>39</sup> Case 14/83 *Van Colson* [1984] ECR 1891, para 23.

<sup>40</sup> Case C-213/89 *Factortame* [1990] ECR I-2433, paras. 19, 20.

Consequently, the Court has in several high-level cases held that Member States and their courts are under the obligation to create additional remedies to those already existent under national procedural rules, if such were necessary to ensure the relation between right and remedy under EU law. Examples are *UPA*,<sup>41</sup> regarding the protection of individuals against regulations which for their effect do not require any further implementing measures; *Borelli*,<sup>42</sup> regarding the protection of individuals in composite procedures with input from Union and Member State administrations into a final administrative decision; and *Factortame*,<sup>43</sup> regarding the establishment of a system of interim relief to effectively protect a right under EU law.

Compliance with the right to an effective remedy then depends both on whether the Member State offers procedural rules granting fair possibilities of bringing a case and that admissibility criteria allow actual access to a court. It also depends on whether success on the grounds of the claim of violation of a right under EU law would lead to a remedy which is capable of addressing the violation of the right.<sup>44</sup> Since *Peterbroeck* and *Van Schijndel* these criteria have been combined to one standard formulation. There under the right to an effective judicial remedy requires that national judicial provisions may not render the application of Union law ‘impossible or excessively difficult’.<sup>45</sup> Whether that is the case must be analysed in an overall view

‘by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In the light of that analysis the basic principles of the domestic judicial system, such as protection of the rights of the defence, the principle of legal certainty and the

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<sup>41</sup> Case C-50/00 P *Unión de Pequeños Agricultores v Council* [2002] ECR I-6677.

<sup>42</sup> Case C97/91 *Oleificio Borelli* [1992] ECR I-6313.

<sup>43</sup> Case C-213/89 *Factortame* [1990] ECR I-2433.

<sup>44</sup> See by comparison the approach to Article 13 ECHR in Application no. 30696/09 *M.S.S. v. Belgium and Greece*, §§ 289,290 [GC] ECHR 2011: ‘The “effectiveness” of a “remedy” within the meaning of Article 13 does not depend on the certainty of a favourable outcome for the applicant. Nor does the “authority” referred to in that provision necessarily have to be a judicial authority; but if it is not, its powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective. Also, even if a single remedy does not by itself entirely satisfy the requirements of Article 13, the aggregate of remedies provided for under domestic law may do so. In order to be effective, the remedy required by Article 13 must be available in practice as well as in law, in particular in the sense that its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State’ (with references to application 25389/05, *Gebremedhin [Gaberamadhien] v. France* § 53, ECHR 2007-V and application 23657/94, *Çakıcı v. Turkey* [GC], § 112, ECHR 1999-IV). Regarding the EU legal system, see: S. Alber, *Recht auf einen wirksamen Rechtsbehelf und ein unparteiisches Gericht – Art. 47*, in: P. Tettinger, K. Stern (eds.), *Kölner Gemeinschaftskommentar zur Europäischen Grundrechte-Charta*, Verlag C.H. Beck (München, 2006), 734, para 34.

<sup>45</sup> Case C-312/93 *Peterbroeck*, [1995] ECR I-4599, para 14 and Joined cases C-430 and 431/93 *Van Schijndel* [1995] ECR I-4705, para 19.

proper conduct of procedure, must, where appropriate, be taken into consideration.<sup>46</sup>

The consequences of such analysis are best portrayed in the situations so far established by the Courts covering both procedural remedies in the sense of individual rights of access to a court as well as the possibility of an individual obtaining a substantive remedy, if winning a case on the merits.<sup>47</sup> Such rights exist in disputes in which individuals claim that rights arising from EU law have been violated by public authorities either of the EU or the Member States. They may also arise in disputes between individuals where the right to an effective judicial remedy has been used to develop anti-discrimination claims.

Amongst the practically most important substantive remedies capable of effectively enforcing rights under EU law are obligations of Member States to make good damages which have arisen from their non-compliance with Union law. Such non-compliance can result from violation of primary law obligations which have direct effect, as well as for violation of secondary law obligations. In its landmark case *Francovich*,<sup>48</sup> the Court of Justice held that a Member State may be liable to pay damages in the case of faulty transposition of a directive if there are no possibilities of using the remedy of exceptionally granting the directive direct effect. Despite the fact that the claim for damages arises from EU law,<sup>49</sup> the procedures for obtaining damages are subject to national law, which under the principle of equivalence, may not provide for procedures for obtaining reparation 'less favourable than those relating to similar domestic claims'.<sup>50</sup> Under *Brasserie du Pêcheur* the same may be applicable to violations of EU law by Member States of primary law provisions.<sup>51</sup> Liability of the Member States was famously expanded in *Köbler*<sup>52</sup> and *Traghetti*<sup>53</sup> to make good damages due to violation of EU law by any of its

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<sup>46</sup> Case C-312/93 *Peterbroeck*, [1995] ECR I-4599, para 14 and Joined cases C-430 and 431/93 *Van Schijndel* [1995] ECR I-4705, para 19.

<sup>47</sup> This appears to be the interpretation of the Courts, which would be more in line with the notion of remedy in the context of the German and English language versions of the text of Article 47 CFR than of the French wording speaking more procedurally of a '*droit à un recours effectif*' than the broader notion of e.g. '*einen wirksamen Rechtsbehelf*' or an 'effective remedy before a tribunal'.

<sup>48</sup> Case C-6/90 *Francovich* [1991] ECR I-5357.

<sup>49</sup> Case C-6/90 *Francovich* [1991] ECR I-5357, paras 40-43.

<sup>50</sup> Case C-6/90 *Francovich* [1991] ECR I-5357, para 43.

<sup>51</sup> Joined Cases C-46 and 48/93 *Brasserie du Pêcheur* [1996] ECR I-1029. In parallel to the case-law relating to Art 340 TFEU, (e.g. Case 5/7 *Zuckerfabrik Schöppenstedt* [1971] ECR 975) the Courts require a 'sufficiently serious' breach of the rule of law which confers rights on individuals. In that, the Court of justice might have applied an 'inverse' principle of equivalence in that the Member States would be held liable under EU law under the same conditions as the Union institutions and bodies.

<sup>52</sup> C-224/01 *Köbler* [2003] ECR I-10239, paras 31-36, 53-55.

<sup>53</sup> C-173/03 *Traghetti* [2006] ECR I-5177.

authorities including the judiciary.<sup>54</sup> National legislation limiting the liability of courts in these circumstances may be in violation of EU law because of the potential violation to the right to an effective remedy.<sup>55</sup>

### *C Judicial remedies in disputes between individuals*

The right to an effective judicial remedy before is not limited to disputes between individuals and Member States or EU institutions and bodies. It is also applicable in view of the protection of rights arising from EU law in ‘horizontal’ disputes between individuals.<sup>56</sup> Cases which have confirmed this indirect horizontal effect of the right to an effective judicial remedy have so far been decided by the Court especially with respect to rights arising from EU legislative acts – both in the form of directives or regulations. Especially productive has been the policy area of non-discrimination, consumer protection and health and safety provisions.

Amongst the leading cases in this field are *Van Colson*<sup>57</sup> and *Dekker*.<sup>58</sup> There the Court established that a Member State implementing a directive on equality between sexes should do so in a way granting sanctions for violation of such rights which would dissuade violation and should guarantee real and effective judicial protection inter alia by having ‘a real deterrent effect’ on a person violating the objectives of the directive.<sup>59</sup> In absence of a specific provision in the directive, the Member States were free to establish whichever sanctions regime – public or private, administrative or criminal – would be adequate. The Court held that where a Union regulation does not specifically provide any penalty for an infringement or refers for that purpose to national laws, regulations and administrative provisions, what is now Article 4(3) TEU,

‘requires the Member States to take all measures necessary to guarantee the application and effectiveness of Community law. For that purpose, while the

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<sup>54</sup> C-173/03 *Traghetti* [2006] ECR I-5177, para 43: Although liability, under these cases, is incurred ‘only in exceptional cases where the national court adjudicating at last instance has manifestly infringed’ the law, such manifest infringement is presumed where the ‘decision involved is made in manifest disregard of the case-law of the Court on the subject.’

<sup>55</sup> C-173/03 *Traghetti* [2006] ECR I-5177, paras 37-45. It held that ‘although it remains possible for national law to define the criteria relating to the nature or degree of the infringement which must be met before State liability can be incurred for an infringement of Community law,’ ‘under no circumstances may such criteria impose requirements stricter than that of a manifest infringement of the applicable law, as set out in paragraphs 53 to 56 of the *Köbler* judgment.’

<sup>56</sup> See e.g. Case C-231/96 *Edis* [1998] ECR I-4951, paras 36, 37.

<sup>57</sup> Case 14/83 *Van Colson* [1984] ECR 1891.

<sup>58</sup> C-177/88 *Dekker v Stichting voor Jonge Volwassenen (VJV) Plus* [1990] ECR I-3941.

<sup>59</sup> Case 14/83 *Van Colson* [1984] ECR 1891, para 23.

choice of penalties remains within their discretion, the Member States must ensure in particular that infringements of Community law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive.’<sup>60</sup>

When the Member State so does, it acts in the ‘scope’ of EU law and thus is obliged to comply with general principles of EU law and its Fundamental Rights.<sup>61</sup> National courts, in fact all public bodies of Member States, are thus obliged to dis-apply Member State law which would jeopardise or make ineffective a right arising from EU law. In *Fuss v Stadt Halle*,<sup>62</sup> for example, the Court of Justice held that the right to an effective judicial review were violated, if a national Court would not sanction a reprisal measure which ‘might deter workers who considered themselves the victims of a measure taken by their employer from pursuing their claims by judicial process, and would consequently be liable seriously to jeopardise implementation of the aim pursued by the directive.’<sup>63</sup>

Also questions of jurisdiction of national courts in civil disputes will be assessed in view of the right to an effective judicial remedy.<sup>64</sup> In that context, Member States tribunals are specifically under the obligation to avoid situations of denial of justice in cases of rights under EU law.<sup>65</sup> As a consequence, national judges in on-going procedures may be obliged to raise issues of EU law on their own motion (*ex officio*). This may be necessary to ensure that a remedy before a national tribunal for breach of EU law is actually effective. It is most frequently but not exclusively a question arising in disputes between individuals. Under the principle of equivalence, a Member State court will be obliged to apply EU law by its own motion, if it would be obliged to do so also with regard to national provisions.<sup>66</sup> Whether the conditions of equivalence exist is assessed on a case

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<sup>60</sup> Case C-186/98 *Nunes et de Matos* [1999] ECR I-4883, paras 9–11 with reference to Case 68/88 *Commission v Greece* [1989] ECR 2965, para 23.

<sup>61</sup> Case C-617/10 *Akerberg* [2013] ECR I-nyr of 26. February 2013, paras. 19–21.

<sup>62</sup> C-243/09 *Fuß v Stadt Halle* [2010] ECR I-9849.

<sup>63</sup> C-243/09 *Fuß v Stadt Halle* [2010] ECR I-9849, para 66, with reference, by analogy, to Case C-185/97 *Coote* [1998] ECR I-5199, paras 24 and 27.

<sup>64</sup> C-327/10 *Lindner* [2011] ECR-nyr, para 49.

<sup>65</sup> See also Case C-292/10 *de Visser* [2012] ECR I-nyr of 15 March 2012, para 59.

<sup>66</sup> Case C-431/93 *Van Schijndel* [1995] ECR I-4705, para 17; Case C-126/97 *Eco Swiss* [1999] ECR I-3055, para 37; Case C-168/05 *Mostaza Claro* [2006] ECR I-10421, para 35.

by case basis<sup>67</sup> and ‘must be analysed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances.’<sup>68</sup> Where a national court is bound by the pleadings of the parties as to the type of relief and the remedies, but not as to the law applicable to the case, it might therefore be obliged to apply EU law on its own motion.<sup>69</sup> In that regard, the Court since *Cofidis*,<sup>70</sup> in cases on the implementation of EU consumer protection directives, ruled that a national rule which in effect prohibits the national court to raise points of EU law renders the ‘application of the protection intended to be conferred on them by the Directive excessively difficult.’<sup>71</sup> It follows, the Court states, that even in absence of specific pleadings by the consumer, ‘effective protection of the consumer may be attained only if the national court acknowledges that it has power to evaluate terms of this kind of its own motion.’<sup>72</sup> This obligation may further exist, where a national court reviews the enforceability of an arbitration award made in the context of a consumer contract.<sup>73</sup> Similarly, in *Peterbroeck*,<sup>74</sup> a tax case with a complex set of national procedural rules, the CJEU held that the General Principle of the right to an effective judicial remedy may require a national court to *ex officio* raise an issue under EU law.

Concerning the right to judicial remedies, the European Commission has, pressured by the European Parliament, in 2011 launched public consultations on introducing an ‘EU framework for collective redress.’<sup>75</sup>

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<sup>67</sup> See critically with further discussion e.g. G. de Búrca, National procedural rules and remedies: The Changing Approach of the Court of Justice, in: J. Lonbay, A Biondi (eds.) *Remedies for Breach of EC Law*, Wiley (London, 1997) chapter 4 pages???

<sup>68</sup> Case C-312/93 *Peterbroeck* [1995] ECR I-4599, para 14 with further references.

<sup>69</sup> This will depend on whether the procedural provisions are designed to allow for the principles of *iura novit curia* (the court knows the law) or under the concept of *da mihi facta, dabo tibi ius* (give me the facts and I will give you the law).

<sup>70</sup> Case 473/00 *Cofidis SA v Fredout* [2002] ECR I-10875.

<sup>71</sup> Case 473/00 *Cofidis SA v Fredout* [2002] ECR I-10875, paras 36-38 requiring taking into ‘account of each case's own factual and legal context as a whole, which cannot be applied mechanically in fields other than those in which they were made.’

<sup>72</sup> Joined cases C-240/98 to C-244/98 *Océano Grupo and Others* [2000] ECR I-4941, para 26; Case C-243/08 *Pannon* [2009] ECR I-4713, para 32; Case C-227/08 *Martín Martín* [2009] ECR I-11939, para 29; Case C-137/08 *Pénzügyi Lízing* [2010] ECR I-10847, paras 48, 51-53; Order of the Court in Case C-76/10 *Pobotovost* [2010] ECR I-11557, paras 40-43. See also M. Ebers, From Océano to Asturcom: Mandatory Consumer Law, Ex Officio Application of European Union Law and Res Judicata (2010) *ERPL* 823-846.

<sup>73</sup> Case C-168/05 *Mostaza Claro* [2006] ECR I-10421, para 30; Order of the Court in Case C-76/10 *Pobotovost* [2010] ECR I-11557, paras 53, 54.

<sup>74</sup> Case C-312/93 *Peterbroeck* [1995] ECR I-4599.

<sup>75</sup> Communication from the Commission to the European Parliament, the Council, the Economic and Social Committee and the Committee of the Regions of 22 May 2012, COM(2012) 225 final, point 4.3.

### *Limitations to the right to effective remedy*

Regarding possible limitations of the right to an effective judicial protection, the CJEU has held that it is not a disproportionate limitation if a Member State by its procedural order introduces additional steps to access to the Courts. Such legitimate steps include, for example, ‘making the admissibility of legal proceedings concerning electronic communications services conditional upon the implementation of a mandatory attempt at settlement.’<sup>76</sup> An instructive example of possible limitations is the *Evans* case.<sup>77</sup> In that case, the UK had implemented a directive on compensation of victims’ damage or injury caused by unidentified or insufficiently insured vehicles in traffic accidents by delegating the assessment of damages to an agency against which appeal to an independent arbitrator was possible and whose award was subject, on limited grounds only, to review a national Court. The Court of Justice was satisfied that those arrangements did not ‘render it practically impossible or excessively difficult to exercise the right to compensation.’<sup>78</sup>

Law enforcement requirements can lead to a limitation of rights to an effective judicial remedy if proportionate. For example, regarding national leniency programmes which are intended to foster the enforcement of EU competition law under Articles 101 and 102 TFEU, the Court has held in *Pfleiderer* that Member States are obliged to ‘ensure that the rules which they establish or apply do not jeopardise the effective application’ of Union law.<sup>79</sup> This includes granting a right to an effective judicial remedy for individuals – possibly through class action suits – facing violation of competition law to their disadvantage. In that case, a complex balancing of interests of effective public versus private enforcement of the Treaty articles was necessary. Balancing these competing requirements is an exercise to be undertaken by Member State legal systems taking into account the right to disclosure of the information, on one hand, and the right to protection of business information provided voluntarily by the applicant for leniency, on the other.<sup>80</sup>

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<sup>76</sup> Joined Cases C-317/08 to C-320/08 *Allassini* [2010] ECR I-2213, para 62.

<sup>77</sup> Case C-63/01 *Evans* [2003] ECR I-14447.

<sup>78</sup> Case C-63/01 *Evans* [2003] ECR I-14447, para 54.

<sup>79</sup> Case C-360/09 *Pfleiderer* [2010] ECR I-nyr, para 24.

<sup>80</sup> Case C-360/09 *Pfleiderer* [2010] ECR I-nyr, paras 31, 32.



A further limitation of the right to an effective judicial remedy has been recognised in the context of competition law. The Court of justice has acknowledged that the right of access to a tribunal can be misused by dominant market participants as strategy to harass competitors. A limitation of such harassment might not only be an option but an obligation in order to enforce the prohibition of misuse of a dominant position under Article 102 TFEU. The GC in *Promedia* held that, since the right to an effective judicial remedy was a fundamental right, ‘it is only in wholly exceptional circumstances that the fact that legal proceedings are brought is capable of constituting an abuse of a dominant position within the meaning of Article 86 [now Article 102] of the Treaty.’<sup>81</sup>

### *Outlook on some problems of effective judicial protection in today’s EU*

Over the past six decades of development of the Union, the right to an effective judicial remedy has been continuously adapted to the Union’s changing constitutional basis and evolving modes of implementation of EU law. Amongst the most significant changes has been the development of a multi-jurisdictional, de-central yet procedurally highly integrated administration. Institutionally, the EU has developed a large amount of agencies which are organisationally separate from Member States administration but procedurally linked to them. This development is in organisational and procedural law terms what one more casually could call the intense ‘Europeanisation’ of many policy areas.

So far rarely addressed, is also the question of how to ensure effective judicial remedies in multi-jurisdictional situations. The case law of the CJEU on this matter essentially addresses situations in which next to the Union legal order, one Member State is involved. In reality, however, the implementation procedures in an increasing amount of policy areas involve actors from several jurisdictions, both national and European.<sup>82</sup> It is not always evident how to identify one or several jurisdictions which might have the competence to grant effective judicial review of acts adopted on the basis of such

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<sup>81</sup> Case T-111/96 *ITT Promedia* [1998] ECR II-2937, para 60; T-105/95 *WWF UK* [1997] ECR II-313, para 56.

<sup>82</sup> Examples for such multi-jurisdictional decision making procedures are for example the areas in which alert systems exist on the basis of which executive bodies from one Member State act implementing the warning of another. These exist for example in areas of regulation of the single market in the area of food safety or medicines. Alert systems also exist in the field of visa and immigration matters for example in the context of the Schengen Information System (SIS). Composite procedures also exist in the field of planning – be it in the field of environmental law, emissions trading, transport and energy and many other fields.

‘composite’ procedures.<sup>83</sup> Input into a final decision may result from various jurisdictions each applying their national law. Review of decisions taken by these means by the Court of the jurisdiction which adopted the final measure might not be able to do justice to the requirements of effective judicial review of the preparatory acts from other jurisdictions. There is, thus, in these areas a potential mis-match between procedural integration of decentrally organised administrations, on one hand, and a clear separation of judicial competencies, on the other. Where thus gaps may arise between dispersed decision-making powers and judicial review, such gaps would be detrimental to the application of the right to an effective judicial remedy.

An example of the many open and difficult questions in the context of multi-jurisdictional and composite EU administrative procedures is the question damages arising from information sharing and joint computer based information systems such as e.g. the RASFF food safety information network.<sup>84</sup> The fact that information is placed in the network might have adverse and damaging effect to a range of individuals such as producers of goods or consumers. There is no satisfactory solution under the current legal system for these issues. Legal uncertainty as to the applicable law, the competent courts and the possible remedies, however is detrimental to the enforcement of EU law in national (and EU-level) courts. Exploring procedural options such as allowing for forms of collective action might offer possible avenues to ensure that legal uncertainty does not deter from enforcement of legitimate interests. I am sure that many other areas of the fast developing and evolutionary area of EU administrative law are especially rich sources of questions for which creative thinking as to procedural and substantive remedies is necessary in order to comply with the EU principle of the right to an effective judicial remedy.

In this context, rarely discussed is also the rising influence of the Ombudsman system under Article 197 TFEU which can grant cost-effective and timely relief in the form increased compliance with EU law by EU institutions, bodies and agencies. Similar institutions exist within most Member States. Ombudspersons offices are linked by a European network designed to refer cases to each other in order to ensure that the

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<sup>83</sup> H.C.H. Hofmann, Composite decision making procedures in EU administrative law, in: H.C.H. Hofmann, A. Türk (eds.) *Legal Challenges in EU Administrative Law*, Elgar Publishing (Cheltenham 2009), 136-167; H-P Nehl, *Legal Protection in the Field of EU Funds*, *ESTAL (European State Aid Law Quarterly)* (2011), 629-652, at p. 648.

<sup>84</sup> See Articles 50-52 of Regulation 178/2002 laying down the general principles and requirements of food law, establishing the European Food Safety Authority and laying down procedures in matters of food safety, OJ 2002 L 31/1 (with amendments).

relevant control institution takes care of a case. Despite lacunae in the cooperation mechanisms, by and large there is a certain cooperation in the interest of individuals seeking redress against problematic non-compliance that has developed. From the point of view of available remedies the European Data Protection Supervisor (EDPS) and the national counterparts of this office as well as the joint supervisory bodies for various EU agencies are more powerful. The EDPS exercises investigatory and controlling, advisory and cooperative functions and has certain quasi-legislative and binding decision-making powers with the task of ensuring that Union institutions and bodies comply with their obligations as formulated in the EU's data protection regulation.<sup>85</sup> Although the power to conduct investigations is broadly comparable with that of the Ombudsman, going beyond this, the EDPS's controlling powers give powers to oblige institutions to act in a certain way, grant powers to allow exemptions from certain data-processing prohibitions. This is backed-up by powers to impose sanctions upon any official or other servant for failure to comply with any obligations emerging from the EU's data protection regulation.

These developments, show that the concept of not only *ex post* judicial review is gaining ground, but also alternative forms of ongoing control and sanctioning for misconduct by administrations are being developed which might in certain situations prove more effective than subsequent control. Additionally, on the level of subsequent judicial review, there is room for allowing for forms of collective redress taking the financial pressure and the burden of time and effort off individuals to enforce rights arising from EU law. Generally speaking, however, the discussion of remedies in the EU looked at from the point of view of the right to an effective judicial remedy needs to take the complexity of a de-central and multi-jurisdictional enforcement system into account. Member States have the prime responsibility but also considerable room for creativity to comply with this specific procedural general principle of EU law. It is also the procedural codes of the Member States, which, although generally autonomously set, with regard to the enforcement of rights under EU law have to comply with the requirements of the EU's right to an effective judicial remedy.

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<sup>85</sup> Regulation 45/2001 of the European Parliament and the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by Community institutions and bodies and on free movement of such data, OJ 2001 L 8/1 (12.1.2001).